(13)

JUL 26 1945

CHARLES ELMORE CROPL
CLER

No. 262

Supreme Court of the United States

OCTOBER TERM 1945.

THE CAPITOL NOVELTY COMPANY, LTD.,
Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ARTHUR L. ROWE,
Attorneys for Petitioner.

McGHEE, ROWE & EVANS,
Of Counsel.

ECKENFELS LAW PRINTING COMPANY, Columbus 15, Ohio

INDEX.

Petition for Writ of Certiorari.

Statement 1
Reasons relied upon 7

Brief.

Questions presented 9
Conclusion 16
Appendix—Applicable statutory provisions 18

Cases and Authorities Cited.

Constitution of Ohio:
Article 2, Section 1 4
Article 12, Section 5 5
Article 12, Section 2 5
Article 1, Section 2 6

Dane v. Jackson, 256 U. S., 589 12

Englehardt v. Keumming, 10 O. N. P. (N. S.), 609 .. 10
Ellery v. Evatt, 140 O. S., 249 10
Erie Railroad Co. v. Thompson, 304 U. S., 64 8

General Code of Ohio:
Section 5325 .....5, 10
Section 5328 5

Harrison v. Sabina, 10 C. C., 53 11

In re: Mytlinger, 31 Fed. Supp., 977 13
In Re: Wong Yung Guy, 2 Fed., 624 .....7, 14

Krauss v. Cleveland, 135 O. S., 43 4

Magruder v. Supple, 316 U. S., 394 13
Mills Operating Co. v. Toronto, 20 O. N. P. (N. S.), 525 10

Ohio Oil Co. v. Conway, 281 U. S., 146.....12, 16
Ohio Valley Fire & Marine Insurance v. Skaggs, 287 So., 969 11
Senior v. Braden, 295 U. S., 522..... 13
State v. McNichols, 117 Pac. (2d), 468..... 11
Western Union Telegraph Co. v. Moyer, 25 O. S., 52 5
White v. Aronson, 302 U. S., 16..... 16
32 O. Jur., 630..... 10
51 Am. Juris., 436..... 14

Supreme Court of the United States

OCTOBER TERM 1945.

No. .....

THE CAPITOL NOVELTY COMPANY, LTD.,
Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

To the Honorable, The Supreme Court of the United States—

Your petitioner, The Capitol Novelty Company, Ltd., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio en-

tered on the twenty-third day of May, 1945, in the above entitled cause.

The question first arose in this matter when the department of taxation, state of Ohio, amended the personal property tax returns for the petitioner for the years of 1938, 1939 and 1940. The petitioner had filed a return of its personal property for each of those years as is required by General Code Sections 5367 and 5368 of the Ohio Tax Law and paid the taxes due on the returns as made by it for those years.

Thereafter the field auditors of the department of taxation of the state of Ohio in making a routine check supplemented the returns of the petitioner for the years of 1938, 1939 and 1940 and added to the returns of the petitioner for those years slot machines as follows—for 1938, slot machines valued at $16,076.00, credits and accounts receivable of the assessed value of $16,155.00, and cash in the amount of $136.00; 1939, as follows, slot machines assessed at a value of $17,082.00 and $1,000.00 in accounts receivable; 1940, as follows, slot machines assessed at a value of $15,041.00. Upon making the assessment on the amended returns, the taxing authorities mailed to the petitioner a preliminary assessment certificate.

The petitioner from the additional assessment as made appealed to the Board of Tax Appeals. A hearing was had before the Board of Tax Appeals and the evidence disclosed that the petitioner had returned for taxation all of the slot machines in its possession and in its place of business. The evidence disclosed that the slot ma-

chines as added to the 1938 amended return of an assessed value of $16,076.00, for the year 1939 of an assessed value of $16,155.00, and for the year of 1940 of an assessed value of $17,082.00 were not in the actual possession of the petitioner, but were turned over to contracting parties. These contracting parties in turn had found locations or places of business where these machines were placed to be played and used by the public. The keys to these machines were in the possession of these contracting parties who serviced the machines and who made the necessary repairs. These slot machines were not on the premises of the petitioner. The petitioner had no control over the contracting parties. The contracting parties were to find their own place of business where these machines were to be placed. The contracting parties were to pay a percentage of the coins taken in by the slot machines. The machines were operated by the insertion of a U. S. coin and the pulling of a lever which caused the rotation of a cylinder on which were placed certain symbols. In case the player was lucky and the cylinder stopped upon the termination of the play upon certain designated symbols, the machine would then return a number of U. S. coins to the player, depending on the pay spot or types of lucky symbols upon which the cylinder in the machine stopped. The machine returned nothing for the coin inserted unless the cylinder stopped on some certain arrangement of symbols identical to a schedule posted on the outside of the machine which designated the amount of pay offs. In case the cylinder did not stop on one of these pay off

arrangements of the symbols, the coin remained in the slot machine and the player received nothing.

The petitioner interposed its objections to the amended returns for the years in question because the department of taxation was including in these returns chattels which were not personal property and chattels which were not the subject of ownership under the Ohio laws, to wit: slot machines.

The evidence as submitted by the petitioner was not disputed.

This appeal from the assessment as made by the department of taxation to the Board of Tax Appeals was affirmed by the Board of Tax Appeals. From this decision, the petitioner appealed to the Supreme Court of Ohio which affirmed the decision of the Board of Tax Appeals.

The appeal of petitioner to the Board of Tax Appeals and to the Supreme Court of Ohio was governed by Secs. 5611-1 and 5611-2 of the General Code of Ohio.

The Supreme Court of Ohio rendered its decision on May 2, 1945, and on application for rehearing rendered its decision on May 23, 1945, denying a rehearing.

The Supreme Court of Ohio has held in the case of Krauss v. Cleveland, 135 O. S., page 43, that slot machines are per se gambling devices.

Constitution of Ohio, Article 2, Section 1, provides:

> "The legislative power of the state shall be vested in a general assembly * * *."

The Supreme Court of Ohio has repeatedly held this to be the source of the taxing power in Ohio subject to certain constitutional limitations.

Western Union Telegraph Co. v. Moyer, 25 Ohio State, 52:

> "The general grant of the legislative power vested in the General Assembly by Article 2, Section 1 of the Constitution includes the power to collect revenue for public purposes, and the limitations on the exercise of this power are to be found in other provisions of that instrument, and in the Constitution of the United States."

Constitution of Ohio, Article 12, Section 5, provides:

> "Levying of Taxes"—"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Article 12, Section 2, provides:

> "No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, * * *"

Pursuant to the foreging constitutional authority the Legislature of Ohio enacted into law Section 5325:

> "The term 'personal property' as so used, includes **every tangible thing being the subject of ownership**, whether animate or inanimate, other than patterns, jigs, dies, drawings, money and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property, as hereinbefore defined; * * *" (Emphasis added.)

Section 5328 of the General Code provides:

> "All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business

> or not shall be subject to taxation regardless of the residence of the owners thereof * * *."

The question for decision by the Ohio Supreme Court in the instant case was whether slot machines were personal property under the Ohio tax laws and if so, was the petitioner as such owner given equal protection and benefit as guaranteed to it by the Fourteenth Amendment to the United States Constitution and if it was such owner, was its property being taken from it without due process of law.

Ohio Constitution, Article 1, Section 2, provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit. * * *"

Under the above provisions of the Ohio Constitution each taxpayer is entitled to have his property taxed according to its true value in money in order to pay for his share of the cost of maintaining the courts and other branches of Ohio government. All taxpayers should in turn receive benefits either direct or indirect from the government of Ohio as guaranteed.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Supreme Court of Ohio has erred where a federal constitutional question is involved, and where the United States Supreme Court has not heretofore determined the question, and has declared principles not in accord with applicable federal decisions.

In re: Wong Yung Quy, 2 Fed., 624. This decision is commented upon at page 14 of the appended brief.

(2) The Supreme Court of Ohio has held that slot machines are per se gambling devices and under the laws of Ohio are subject to confiscation and destruction.

(3) The Supreme Court by its decision has recognized property rights in slot machines for taxation purposes while by the decisions of the Ohio courts and the acts of the Legislature petitioner's property rights are not given any protection.

(4) The law as now existing in Ohio by reason of this decision of the Supreme Court is taking the chattels of the petitioner without due process of law.

(5) The taxing of the petitioner's right of ownership in slot machines without giving the petitioner equal or the same protection of its right of ownership in said chattels in the courts of Ohio as is afforded other taxpayers on their rights of ownership in chattels is a failure of the state of Ohio to give to the petitioner equal protection of the law as is guaranteed by the Fourteenth Amendment of the United States Constitution.

(6) Since Erie Railroad Co. v. Thompson, 304 U. S., 64, the Ohio decision in the instant case is the law to be applied by the federal courts in Ohio, and on appeal would be the law of this court, since this court has never heretofore determined the question.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio, commanding that court to certify, and to send to this court for review and determination, on a day certain to be therein named a free and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 30220, The Capitol Novelty Company, Ltd., appellant v. William S. Evatt, Tax Commissioner, appellee; and that said judgment of the said Supreme Court of Ohio may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

The Capitol Novelty Company, Ltd.
By Arthur L. Rowe,
Attorney for Petitioner.

McGhee, Rowe & Evans,
Of Counsel.

BRIEF.

QUESTIONS PRESENTED.

(1) The Supreme Court of Ohio has erred where a federal question was involved and which on principles is not in accord with applicable federal decisions.

In the instant case, the Supreme Court of Ohio has determined that the petitioner should pay a tax on slot machines which were not in its possession. These machines were exhibited to the public for play and were by the Ohio Supreme Court's own decision (Krauss v. Cleveland, 135 Ohio State, 43) contraband and illegal property. Being such, they were subject to confiscation and destruction by the officers of the peace and the courts of Ohio (General Code, Sections 13430-1, 13430-7, 13430-8, See appendix).

Under the decisions of the Ohio courts, the petitioner could assert no dominion over these machines for in the case of State v. Williams, 9 Ohio Decisions Reprint, page 61, the accused was released by order of the court upon a decision of the court that the accused could not be guilty of stealing chattels in which there was no right of ownership, to wit: gambling devices.

No right of property exists on these machines (on which petitioner must pay taxes) which is recognizable by the Ohio courts which will permit the petitioner to file an action for the recovery of the possession of these machines in a replevin action—as the court held no prop-

erty rights exist in Ohio in gambling devices, Mills Operating Co. v. Toronto, 20 Ohio Nisi Prius (New Series), 525, justifying the court to entertain a replevin action.

No action could be maintained by the petitioner against a tort feasor who would damage these machines since the Ohio courts have held since there is no property rights in gambling devices nothing has been damaged, Englehardt v. Keumming, 10 Ohio Nisi Prius (New Series), 609.

The Supreme Court in the instant case affirmed the case of Ellery v. Evatt, 140 Ohio State, p. 249.

The court in determining what is taxable cites Section 5325, General Code:

> "• • • The term personal property includes every tangible thing being the subject of **ownership.**"

What is ownership in Ohio? In 32 Ohio Jurisprudence, page 630, we find:

> "In general, an owner is one who owns, a rightful proprietor, he is one who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases."

Page 604 of the same volume, we find a quotation from Blackstone:

> "That sale and despotic dominion which one may claim and exercise over the external things of the world, in total exclusion of the rights of any other individual in the universe."

Ohio Valley Fire and Marine Insurance v. Skaggs, 287 Southern, page 969:

> "Essence of ownership of a thing is aid which organized society through courts, as its agents, will give one individual, to the exclusion of all others, to take or keep possession of it."

Harrison v. Sabina, 1 Oh. Circuit Court, page 53:

> "Property is defined to be the right and interest which a man has in lands and chattels to the exclusion of others. Who is an owner? He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases."

State v. McNichols, 117 Pacific (2d), 468, page 470, the court said:

> "The rule is well established that slot machines like other gambling devices, are not property."

In passing on the issue of ownership for the purpose of determining what "tangible things are subject of ownership" the Supreme Court of Ohio arbitrarily discarded all rules of Ohio jurisprudence and all rights guaranteed to the petitioner under the U. S. Constitution and the Ohio Constitution in disposing of the issue in the case. The courts of Ohio deny the petitioner any rights of property or rights of ownership in the slot machines by permitting a thief to steal the machines, a tort feasor to damage the machines, a trespasser to wrongfully withhold the machines from the petitioner—saying to the petitioner that you have no property rights or rights of ownership which the Ohio courts will pro-

tect. These same courts are partially maintained by the taxes which the petitioner will pay if the Supreme Court of Ohio is correct. In other words, under the rule handed down by the Ohio courts, the petitioner is, by paying taxes, helping maintain courts for the protection of other taxpayers of Ohio without receiving any protection from the Ohio courts for the taxes so paid. This the petitioner contends is a failure to give it an equal protection of the law as is afforded to other taxpayers of Ohio and the decision in the instant case is denying the petitioner its rights as guaranteed by the Fourteenth Amendment.

(At this point, petitioner feels that it should divert for a moment and say that the remedy is one for the Legislature of Ohio to solve by enacting the proper legislation.)

Ohio Oil Company v. Conway, 281 United States, Chief Justice Hughes, page 146, said:

> "The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment. * * *"

Dane v. Jackson, 256 United States, Mr. Justice Day, page 589:

> "and that where, as here, conflicts with federal power is not involved, a state law will be held to conflict with the Fourteenth Amendment only when it proposes, or clearly results in, such flagrant and probable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation, to

spoliation under the guise of exerting power of taxing."

Petitioner here contends, as it did in the Supreme Court of Ohio, that the burden imposed by taxing the petitioner's right of ownership in slot machines without affording any protection to that ownership in the state courts and by public police protection is the taking of the petitioner's property without compensation or benefits, and such taking is denying the petitioner due process of law, as well as denying to it the equal protection of the Ohio laws as is afforded to other taxpayers of Ohio.

Senior v. Braden, 295 United States, page 522.

This case was an appeal from the Supreme Court of Ohio which upheld the validity of an application under the state intangible property tax. In reversing the Ohio Supreme Court, Mr. Justice McReynolds in delivering the opinion of the court, page 429, said:

"The validity of the tax under the federal Constitution is challenged. Accordingly, we must ascertain **for ourselves upon what it was laid.**

Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes."

Cooley's Constitutional Limitations, 8th Edition, Volume 2, page 986; also

In re: Mytlinger, 31 Fed. Supp., page 977.

Magruder v. Supplee, 316 United States, page 394:

"The taxation of property is necessarily limited to property and nothing can be taxed unless it constitutes property in the legal meaning of that term."

51 American Jurisprudence, page 436:

> "Where the common law rule prevails, however, that dogs are not property so as to render the larceny of a dog an object of prosecution, it has been held that dogs are not property for the purpose of taxation."

Petitioner does not contend that a slot machine is not a tangible thing, but is a thing corporeal. Not all things tangible and corporeal are considered property. The body of a deceased person in many cases is used in medical science and are as valuable as the books on the subject of medicine in class room use, but yet these are not considered property. If they are not property, they could not under the Ohio law be considered a subject of ownership. Ohio in the case of Hodull v. Hodull, 7 Ohio Circuit Court, 196, held there was no property in the remains of a deceased person.

In re: Wong Yung Quy, 2 Fed., page 624.

California had a statute requiring a certificate be obtained for the removal of the remains of a deceased person from its burial place. A fee was required of $10.00. Petitioner filed an application for the permit to exhume a deceased ancestor, but refused to pay the $10.00 fee. He removed the body—was arrested—fined $50.00 and on failure to pay was placed in jail for 25 days.

He filed a writ of habeas corpus claiming the law was unconstitutional: that it was in violation of Article I, Section 10, Subdivision 2, "no state shall without consent of Congress, place any imports or duties on imports or exports, * * *."

Court in referring the writ on page 631, said:

> "Besides the remains of a deceased person are not exports within the meaning of the term as used in the Constitution. The term refers to only those things which are **property**. There is no property in any just sense in the dead body of a human being, since there was no property in the dead body, there could be no export duty on the same."

Petitioner reiterates that since there is no property in its slot machines there could be no valid tax levied on such machines. For the state of Ohio to say that the petitioner has a right of ownership in a tangible thing and taxing this right and the courts of Ohio at the same time denying any right of proprietorship or right of property in such machines is taking this petitioner's property without due process of law and is giving to other taxpayers of Ohio the protection of law and the courts while denying these protections to the petitioner and is, therefore, denying the petitioner the equal protection of law as afforded to other taxpayers and is in violation of the Fourteenth Amendment of United States Constitution.

The rule of law as promulgated by the Supreme Court of Ohio is the law binding on the federal courts in Ohio since this court's decision in the case of Erie Railroad Company v. Thompson, 304 United States, 64. Will the federal courts in Ohio adhere to the rule as determined by the Supreme Court in Ohio in the instant case or will this court adhere to the principle as stated by Mr. Justice Day in Dane v. Jackson, supra, where he said, "the

state law must not result in such flagrant and probably inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation"—and also by Chief Justice Hughes in Ohio Oil Co. v. Conway, supra, where he said: "The states in the exercise of their taxing powers are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment."

In White v. Aronson, 302 United States, page 16, Mr. Justice McReynolds said:

> "Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorable to the taxpayer."

CONCLUSION.

Summarizing the foregoing, it is petitioner's contention—

(1) All the elements giving this court jurisdiction to grant a writ of certiorari are present in this case.

(2) There is involved in this case the question of the constitutionality of an Ohio statute as interpreted by the decision of the Supreme Court of Ohio as measured by the Fourteenth Amendment to the United States Constitution.

(3) It has been decided by this court that taxing statutes are liberally construed in favor of the taxpayer.

(4) The petitioner, under the decision of the Supreme Court of Ohio will be compelled to pay taxes on chattels without receiving in return any protection of the courts of Ohio for his right of ownership in and to such chat-

tels and is, therefore, denied due process of law as measured by the Fourteenth Amendment.

(5) The petitioner, under the decision of the Supreme Court of Ohio, is denied the equal protection of the laws and of the courts of Ohio as is afforded other taxpayers of Ohio and is, therefore, denied equal protection of the law as measured by the Fourteenth Amendment.

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submited,

ARTHUR L. ROWE,

Attorneys for Petitioner.

McGHEE, ROWE & EVANS,

Of Counsel.